Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

NATIONWIDE MUTUAL INSURANCE COMPANY,

Petitioner,

versus

BERRYMAN PRODUCTS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. DOES THE EQUITABLE MOOTNESS OF A CHAPTER 11 PLAN OF REORGANIZATION MAKE MOOT A DIRECT APPEAL OF ESTIMATION OF A CLAIM?

II. SHOULD EQUITABLE MOOTNESS BE A THRESHOLD TEST WHETHER AN APPEAL WILL BE CONSIDERED ON THE MERITS?

III. DOES DETERMINATION OF EQUITABLE MOOTNESS REQUIRE A CASE-BY-CASE EVALUATION OF THE FEASIBILITY OR FUTILITY OF EFFECTIVE RELIEF?

IV. WHAT GUIDELINES SHOULD THE LOWER COURTS FOLLOW TO DETERMINE WHETHER EFFECTIVE RELIEF CAN BE DEVISED?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Nationwide Mutual Insurance Company is the Petitioner in this case. Its parent companies, subsidiaries and non-wholly owned subsidiaries are: Allnations, Inc.; California Cash Management Company; Colonial Insurance Company of California; Employers Insurance of Wausau; Farmland Mutual Insurance Company; Global Exchange, Inc.; Lone Star General Agency; Nationwide Agribusiness Insurance Company; Nationwide Cash Management Company; Nationwide Community and Ohio Farm Bureau Synfuels; Nationwide Communication, Inc.; Nationwide Corporation; Nationwide Development Company; Nationwide General Insurance Company; Nationwide Indemnity Company; Nationwide Property & Casualty Insurance Company; Neckura Insurance Company; and Scottsdale Insurance Company. Respondent is Berryman Products, Inc.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is set forth in the Appendix, Exhibit A and is unreported. The opinion of the United States Court of Appeals for the Fifth Circuit which is referred to in the decision, is set forth in the Appendix, Exhibit B.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. § 1254(1). The United States Court of Appeals for the Fifth Circuit entered its judgment affirming the district court's decision dismissing Appellant's appeal, on September 13, 1999. This Petition was timely filed within 90 days after entry of the judgment, and is thus timely.

Jurisdiction in United States Court of Appeals was based on 28 U.S.C. § 1291. Jurisdiction in the United States District Court was based on 28 U.S.C. § 158. Jurisdiction in the United States Bankruptcy Court was based on 28 U.S.C. §§ 157 and 1334.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

Article III, Section 2 of the Constitution of the United States.

The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made,

under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between tow or more States, between a state and citizens of another state,[1] between citizens of different States, between citizens of the same state claiming lands under grants of different States, and between a state or the citizens thereof, and foreign States, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

11 U.S.C. § 502(c)

There shall be estimated for purpose of allowance under this section - -

(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or

[1]This clause has been affected by Amendment XI.

(2) any right to payment arising from a right to an equitable remedy for breach of performance.

STATEMENT OF THE CASE

This is a petition from a judgment of the Fifth Circuit Court of Appeals which dismissed as moot Petitioner, Nationwide Mutual Insurance Company's appeal of the procedure used by the United States Bankruptcy Court for the Northern District of Texas to estimate Petitioner's claim (the "Estimation Appeal") in a Chapter 11 bankruptcy case. The Respondent, Berryman Products, Inc. is the debtor in the bankruptcy proceeding. In a separate appeal, the Fifth Circuit Court of Appeals held that the district court properly dismissed as moot Petitioner's appeal of confirmation (the "Confirmation Appeal") of a Chapter 11 plan of reorganization which incorporated the estimation procedure complained of in the present case. The Fifth Circuit applied its decision in the Confirmation Appeal as its basis for determining that the Estimation Appeal was moot.

Proceedings in Bankruptcy Court, District Court and Court of Appeals.

After conducting a contested hearing to estimate Petitioner's claim for purposes of allowance under 11 U.S.C. § 502(c), the bankruptcy court entered an order estimating and allowing Petitioner's claim in the amount of $6 million. Respondent then filed a Rule 59 Fed. R. Civ. P. motion to amend, which the Bankruptcy Court granted, to change the effect of the order to temporary allowance of the claim for voting and feasibility purposes only, with respect to a plan of reorganization which the debtor filed shortly before the

bankruptcy court entered its original order allowing Petitioner's claim. The bankruptcy court later confirmed the Chapter 11 Plan over Nationwide's objection.

Nationwide appealed the confirmation order and later appealed the bankruptcy court's estimation order (which became final after confirmation of the plan) to the United States District Court for the Northern District of Texas. The district court determined, after a lapse of more than 3 years, that both appeals should be dismissed as moot. Nationwide then appealed the district court's separate orders in the Estimation Appeal and the Confirmation Appeal to the Fifth Circuit Court of Appeals. The Fifth Circuit declined to consolidate the appeals and reached the Confirmation Appeal first. On November 18, 1998, in a published opinion, *Nationwide Mutual Insurance Co. v. Berryman Products, Inc.*, 159 F.3d 941 (5th Cir. 1998), the Fifth Circuit dismissed the Confirmation Appeal as moot. Nationwide went forward with the Estimation Appeal, which the Fifth Circuit dismissed as moot by a *per curiam* unpublished order filed September 13, 1999.

Factual Background for Nationwide's Claim.

Petitioner's claim against Berryman Products arises out of a lawsuit filed by an individual named Matt Hart against Berryman Products in California. The lawsuit was a personal injury/products liability case against Berryman Products which is the manufacturer of a brake cleaner product, and C. P. Hunt Co., a mere distributer of the brake cleaner. Nationwide insured C. P. Hunt Co. The automobile in which Hart was a passenger was involved in an accident in which Hart was rendered quadriplegic, and he has since died from the injuries. Hart claimed that the accident was caused

by brake failure following application of the brake cleaner to the automobile in which he was a passenger.

Berryman Products assumed the defense of the Hart lawsuit, and entered into an agreement to provide a complete defense of Nationwide's insured, C. P. Hunt Co., without regard to Berryman Products' available insurance coverage. The contract created contractual obligations in addition to common law indemnity owed by the manufacturer of a product to a mere distributer of the product. Once Berryman Products assumed defense of C. P. Hunt Co., it dismissed C. P. Hunt Co.'s contribution claims against Berryman Products.

The case went to trial and the jury returned a verdict which formed the basis of a judgment against the defendants for approximately $7.5 million. Prior to Hart's death, Berryman Products repudiated its contractual obligations created by the agreement with Nationwide, and abandoned its common law obligation to indemnify C. P. Hunt Co. as the distributor of the product.

Nationwide advanced $6 million to Hart to settle Hart's claim against Nationwide's insured. The bankruptcy court found Nationwide was compelled to make this payment on behalf of its insured when Berryman Products breached its indemnity obligation, which existed according to common law and a written indemnity agreement.

Berryman Products filed its bankruptcy petition because Hart recovered a $7.5 million judgment against Berryman Products in the California lawsuit. Other than debts to trade creditors and insiders, Berryman Products was solvent and apparently profitable. However, after rendition of the judgment, debtor filed Chapter 11. Bankruptcy

permitted Berryman Products to appeal the California litigation and to seek to restructure its obligations to Nationwide.

The debtor's plan of reorganization ultimately confirmed in the bankruptcy court transformed Nationwide's liquidated, non-contingent claim arising out of its good faith settlement agreement, into a long-term unsecured obligation amortized over 30 years, payable in installments with a balloon payment due in 15 years. Petitioner objected to the plan because it violated the absolute priority rule, is not fair and equitable and improperly classified Nationwide's claims apart from other unsecured creditor claims.

Before filing its plan of reorganization, Berryman Products represented to the bankruptcy court that it could not formulate a plan of reorganization without estimation of Nationwide's claim. Berryman Products took the position that the claim was contingent and unliquidated, and succeeded in imposing an estimation procedure on Nationwide, over its objection. The bankruptcy court authorized a suggested procedure for discovery and conducted a hearing of the estimation motion. The Court ruled in favor of Nationwide, estimating its claim at the full $6 million claimed by Nationwide. Berryman Products then filed a motion to amend the order, to provide that estimation was for voting and feasibility purposes only. However, the plan and disclosure statements which were filed before the bankruptcy court's order on estimation, put Nationwide in a separate class of creditors, so that estimation for voting purposes was irrelevant. The plan also anticipated payment of Nationwide's claim, but subject to litigation in the 96th District Court in Tarrant County, Texas and in California. Estimation for feasibility was also unnecessary, since the plan

was feasible even if the full $6 million claim were allowed. Even so, the bankruptcy court granted the motion and limited the effect of its estimation order. Now Nationwide is exposed to re-litigating the entire matter in the bankruptcy court, after the state court proceedings are completed.

Shortly after the bankruptcy case was filed, the debtor filed an adversary proceeding against Nationwide, which was dismissed. The debtor re-filed essentially the same case in the 96th District Court in Tarrant County, Texas, styled "*Berryman Products, Inc. v. Nationwide Mutual Insurance Company and James T. Maley*", Cause No. 96-148805-93. In this proceeding, Berryman Products seeks to obtain a declaratory judgment concerning its obligations under the indemnification agreement and at common law and seeks to recover damages against Nationwide for alleged tortuous interference with its prospective opportunities, and other relief. After the bankruptcy court entered its findings of fact an order estimating Nationwide's claim, Nationwide gave notice of those findings in the state court proceeding and requested the state court to give *res judicata* effect to the order. Berryman Products responded by requesting the bankruptcy court to change the effect of its order.

The treatment of Nationwide's claim under the plan which was confirmed is inconsistent with allowance of its claim, which was originally granted by the bankruptcy court. The plan provides that payment is contingent upon completion of litigation in the state courts in Texas and California, and re-litigation of the claim in the bankruptcy court.

Petitioner appealed the bankruptcy court's refusal reinstate its original estimation order to the United States

District Court for the Northern District of Texas on April 24, 1995. Berryman Products filed a motion to dismiss and nearly three years later, on March 20, 1998, the district court granted the motion to dismiss and signed a final judgment dismissing the appeal with prejudice. Nationwide perfected appeal to the Fifth Circuit Court of Appeals on April 24, 1998. The district court granted an extension of time for filing the notice of appeal by the order entered June 8, 1998.

The Fifth Circuit published its opinion dismissing the Confirmation Appeal on November 18, 1998, just after Nationwide filed its appellant's brief in the Estimation Appeal on November 4, 1998. After the opinion in the confirmation appeal was published, Berryman Products took the position in its brief that the Estimation Appeal was moot. The Fifth Circuit granted oral argument which was heard on September 10,1999. The panel hearing oral argument then signed a *per curiam* opinion dismissing the Estimation Appeal as moot, citing the opinion in the Confirmation Appeal.

Restatement of the Issues Raised by the Two Appeals.

In the Confirmation Appeal, Nationwide argued that Berryman Products intentionally manufactured mootness by providing that unsecured creditors would receive an immediate payment in cash after confirmation of the plan. Nationwide was unable to obtain a stay of this provision, and the cash distribution was actually made several hours before the bankruptcy court, much less the district court, took up the question of a stay. In its opinion in the Confirmation Appeal, the Fifth Circuit reasoned that the plan could not be set aside because to do so would prejudice the unsecured creditors who would be required to return the cash payments if confirmation

were reversed. Nationwide argued unsuccessfully that confirmation of the plan was not moot because lesser effective relief could be fashioned. The Fifth Circuit did not address this issue and made no apparent effort to determine what lesser relief might be available.

In the Estimation Appeal, Nationwide argued that reversal of the bankruptcy court and reinstatement of the original order estimating and allowing Nationwide's claim in the amount of $6 million is the kind of lesser relief which other courts of appeal have referred to when analyzing the doctrine of equitable mootness of bankruptcy appeals. The panel failed to remand to the district court or the bankruptcy court for further proceedings to determine whether reinstatement of the bankruptcy court's allowance of the claim should be granted, but instead dismissed the appeal as moot.

REASONS WHY THE PETITION SHOULD BE GRANTED

It is a given that the plan of reorganization in the Berryman Products case is final and non- appealable. The Fifth Circuit Court of Appeals wrote and published an opinion applying the doctrine of equitable mootness in the Confirmation Appeal, concluding that it would be inequitable to reverse confirmation of the plan of reorganization, notwithstanding that under Article III of the United States Constitution "a live case or controversy exists". *Nationwide Mutual Insurance Company v. Berryman Products, Inc.*, 159 F.3d 941 (5th Cir. 1998, reh. den'd); Appendix, p.6a. The Fifth Circuit concluded that on appeal it may decline to consider the merits of confirmation "when a plan has been so substantially consummated that effective judicial relief is no

longer available - - even though the parties may have a viable dispute on appeal", citing *In Re Andreuccetti*, 975 F.2d 413, 418 (7th Cir. 1992); *In Re Crystal Oil Co*, 854 F.2d 79, 82 (5th Cir. 1988); and *In Re Roberts Farms, Inc.*, 652 F.2d 793, 798 (9th Cir. 1981).

What is before the Court in this petition is the question whether mootness is a bar in an appeal which seeks not reversal of the plan of reorganization, but lesser relief; in this case, reinstatement of the bankruptcy court's allowance of Nationwide's claim. Subsidiary questions are whether mootness should be a threshold test of such an appeal, whether the lower court should examine equitably moot cases on a case-by-case basis, and what guidelines should be used by lower courts to devise effective relief.

Nationwide's petition concerns the aborted estimation procedure whereby the bankruptcy court first estimated and allowed Nationwide's claim under 11 U.S.C. § 502(c), but then modified its order and limited estimation to purposes of feasibility and voting on Berryman Products' Chapter 11 plan. Nationwide sought to reinstate the original allowance of its $6 million claim, arguing that the bankruptcy court is obligated to estimate for allowance under Section 502(c) and that Berryman Products is judicially estopped to change the rules of the game after the bankruptcy court allowed the claim. The Fifth Circuit Court of Appeals refused to consolidate the Estimation Appeal with the Confirmation Appeal, and in its first opinion, in *dicta*, addressed aspects of the Estimation Appeal which had not been briefed or presented to the court.

In the Estimation Appeal, Nationwide sought reinstatement of the bankruptcy court's original estimation of

its claim, which would eliminate the necessity of re-litigating the claim in the bankruptcy court after completion of a limited state court action (to measure potential counterclaims). But the Fifth Circuit did not evaluate the feasibility of this relief, because it mechanically applied the mootness decision in the Confirmation Appeal as a threshold bar to consideration of effective relief in the Estimation Appeal.

The Fifth Circuit's action in dismissing the Estimation Appeal is in stark contrast to the approach of other circuit courts of appeal which have concluded that the appellate court should not dismiss an appeal as moot where effective relief can be crafted. See, *In Re AOV Industries, Inc.*, 992 F.2d 1140, 1141 (D.C. Cir. 1986); *Matter of UNR Industries, Inc.*, 20 F.3d 766, 769 (7th Cir. 1994); *In Re Combined Metals Reduction Co.*, 557 F.2d 179, 194-195 (9th Cir. 1977); In the *Matter of 203 North La Salle Street Partnership*, 126 F.3d 995, 961 (7th Cir. 1997). Yet these cases do not articulate meaningful guidelines for litigants on how to ask for or obtain lesser, effective relief.

The dissent in *In Re Continental Airlines*, 91 F.3d 553, 567-573 (3rd Cir. 1996) cert. den. ___ U.S. ___, 136 L.Ed. 610, 117 S.Ct. 686 (1997) addressed the issues raised in this petition. The debtor in the *Continental* case told the bankruptcy court that if its plan was confirmed "any appeal would be moot", *Id.* at 567, and ultimately escaped appellate review because the Third Circuit, *en banc*, applied the doctrine of equitable mootness as a threshold bar to the appeal. The dissent analyzed the doctrine of "equitable mootness" and found two possible principals on which the doctrine is based. The first principal is that equitable mootness may be applied when "no relief [is] practicable".

Id. at 569. The second basis is the suggestion that the Bankruptcy Code contains gaps in which the federal courts have the authority "to create a rule of federal common law to fill [the] gap". *Id.* at 570. The dissent concluded that regardless which principal supports the doctrine of equitable mootness, its application to dismiss an appeal as moot is unfair and unjust if mootness is applied as a threshold bar to consideration of the merits of an appeal. *Id.* at 571.

The dissent noted that the appellants in *In Re Continental Airlines* were not seeking to upset the plan of reorganization; "rather, they are attempting to obtain payments that they claim are due to them pursuant to that plan". Significantly, the dissent noted:

> Moreover, even if the success of the reorganization might be imperiled if the Trustees obtained the full relief that they are seeking - - an empirical proposition that is not self-evident - - the courts could surely fashion some measure of lesser relief that would not disturb the reorganization. [Emphasis added] *Id.* at 571.

The dissent recognized that the desirability of preserving a confirmed plan is not necessarily inconsistent with an appellant's request for relief. It is "a question of remedy, to be decided after the merits of the [appellant's] arguments are addressed, and not a threshold question of 'mootness'". *Id.* at 571. The dissent concluded with the following remarkable observation that:

> ...even if we find that [equitable mootness] is applicable, it does not necessarily dictate

> that we dismiss the appeal or affirm in its entirety a district court order of dismissal. Rather, we retain the ability to craft, or to instruct the district or bankruptcy courts to craft, a remedy that is suited to the particular circumstances of the case. Thus, a remedy could be fashioned in the present case to insure that the continental reorganization is not undermined. [Emphasis added] *Id.* at 571-572.

With respect to the appellants' failure to obtain a stay in the *Continental* case, the dissent stated that the lack of a stay should not be an element in denying an appeal by the threshold application of the doctrine of mootness; it should be a factor which "might limit the relief that would be available to them if they succeeded on the merits of their appeal, but it cannot justify the refusal at the outset even to consider their arguments". *Id.* at 572. As a concluding observation, the dissent stated:

> If the Trustees' claim were considered and they won on the merits, any threat to the reorganization or to legitimate reliance interests [of third parties not before the court] could be taken into account in framing the Trustees' relief. What the district court and the majority have done - - throwing the Trustees out of court before the merits of their claim are even heard - - is unjustified and unjust. *Id.* at 572-573.

The dissent in *Continental*, echoing comments in cases from other courts of appeal, suggested that the lower courts have the power to "craft relief." Those comments are meaningless if the plan is *res judicata* as to all plan provisions. Therefore Nationwide respectfully suggests that

there is indeed an "interstice" which this Court should fill in the interest of justice, since this question recurs with regularity. *United States v. Little Misere Land Co. Inc.*, 412 U.S. 580, 593, 93 S.Ct. 2389, 2397, 37 L.Ed. 187 (1973).

The cases which have touched on equitable mootness have failed to articulate the power of the lower courts to consider and grant effective relief, and there is an absence of guidelines for any court considering the issues. Why is this important? One answer is that establishing guidelines for lower courts to follow in considering and granting effective relief, notwithstanding that a plan of reorganization has been confirmed, will eliminate the incentive to debtors to manufacture mootness.

The Berryman Products case is an example of a debtor's manipulation of the doctrine of equitable mootness to insulate the debtor from appellate review. The debtor filed bankruptcy because of the $7.5 million judgment and the failure of its own insurance carrier to pay the judgment and protect Berryman Products from collection efforts by the successful plaintiff. The focus of the bankruptcy proceeding was avoidance and delay in paying any obligation to Nationwide flowing from the judgment and its settlement. Berryman Products was an apparently solvent and even profitable corporation before the judgment, but naturally when it filed bankruptcy, there were outstanding trade payables to its vendors and other creditors in the ordinary course of its business, which were suspended and not paid when the debtor filed its petition. These incidental claims were used to "cram down" a plan and moot Nationwide's appeal of the plan and the bankruptcy court's inconsistent actions in allowing Nationwide's claim.

Berryman Products' objective was to transform the obligation to Nationwide from a presently payable obligation to one which would be amortized over 30 years and paid, substantially, by a balloon payment which comes due in 15 years. Berryman Products proposed this transformation in its plan. It could anticipate that Matt Van Hart, the injured plaintiff in California, and Nationwide would reject the plan. Therefore the debtor had to find at least one class of impaired creditors who would vote for the plan. 11 U.S.C. 1129(a)(10). It also had to plan to "cram down" confirmation of the plan over the objection of Nationwide, under 1129(b)(2)(B). If it could succeed in the bankruptcy court it still needed to insulate confirmation from appeals in the district court and the court of appeals, which it accomplished by manufacturing mootness.

It was essential that the vendor class be "impaired", so that its acceptance would satisfy 11 U.S.C. § 1129(a)(10). Although the evidence at the confirmation hearing was disputed, Nationwide contended that had it desired to do so, Berryman Products could have accumulated cash after the bankruptcy filing in an amount sufficient to pay immediately 100% of the vendor class claims. However, a 100% payment would mean that the class was not impaired, so Berryman Products provided in the plan that it would pay the full amount of claims to vendors over a four month period, provided that those creditors reinstated their original credit terms. Berryman Products could then argue that the creditors were impaired, that reinstatement of those credit terms was a condition to the creditors receiving the full payment, and that restoration of credit was essential to its reorganization. Predictably, the majority of the vendor class accepted the payments and restored pre-petition credit terms. This maneuver accomplished a cram down of the plan.

Berryman Products manufactured mootness by providing that the cash payments would start at the earliest possible time after the confirmation order became final. Although the debtor could reasonably argue that it was important to reestablish credit terms with its vendors sooner rather than later, in reality this provision of the plan was designed to trigger substantial consummation of the plan as soon as possible, in hopes that Nationwide could not obtain a stay before the payments were made. This would shield Berryman Products from an appeal, regardless whether the plan was "otherwise fair and equitable," which is the principal requirement of 11 U.S.C. § 1129(b).

Berryman Products' strategy worked stunningly well. Nationwide failed to obtain a hearing (which it lost) on its motion for stay by the bankruptcy court until after the debtor had actually made the first distribution to the creditors. Nationwide then requested a stay from the district court. The district court denied the stay noting deficiencies in Nationwide's pleadings. Nationwide never returned to the district court or appealed to the Fifth Circuit. As a practical matter, "the cows were out of the barn" -- the funds had already been paid.

Nationwide appealed confirmation and the estimation order to district court. Three years later, after the district court finally granted Berryman Products' motions to dismiss the appeals as moot, Nationwide appealed to the Fifth Circuit. In the Confirmation Appeal, the Fifth Circuit brushed aside the argument that mootness was manufactured, since in its view, all three of the elements of equitable mootness were present. Nationwide had failed diligently to obtain a stay, the

plan had been substantially consummated by payment to the vendors (and certain insiders), and because the relief requested in the Confirmation Appeal was reversal of the plan, the rights of parties not before the court would be affected. Under the Fifth Circuit's rule, no remand for consideration of lesser relief was granted in either appeal because mootness was treated as a threshold test for consideration of the merits of the appeals.

The Fifth Circuit's standard for determining whether an appeal is equitably moot is whether the court believes that it would be neither "prudent" nor "equitable" to grant relief. *Manges v. Seattle - First National Bank (In Re Manges)*, 29 F.3d 1034, 1038-39 (Fifth Circuit 1994), cert. den'd. 115 S.Ct. 1105 (1995); See also *In Re UNR Industries*, 20 F.3d 766, 769 (7th Cir.) cert. den'd. 115 S.Ct. 509 (1994). However, the Fifth Circuit's rule is in conflict with the rule established by other circuits. The Eleventh Circuit has held "even if substantial consummation has occurred, a court must still consider the circumstances of the case to decide whether it can grant effective relief". *First Union Real Estate Equity & Mortgage Investments v. Club Associates (In Re Club Assocs.)*, 956 F.2d 1065 (11th Cir. 1992). The District of Colombia Circuit has held that "determinations of mootness ... require a case- by-case judgment regarding the feasibility or futility of effective relief should a litigant prevail". *In Re AOV Industries, Inc.*, 792 F.2d 1140 (D.C. Cir. 1986), *vacated in part on other grounds*, 797 F.2d 1004 (D.C. Cir. 1986). This Court should resolve this conflict.

Petitioner suggests that the appropriate rule is that a determination of equitable mootness does require a case-by-case evaluation of the feasibility or futility of effective relief. The next question then is, what guidelines

should the lower courts follow to determine whether effective relief can be devised? Two guidelines suggest themselves immediately. First, equitable mootness should not be applied as a threshold test whether the appeal should go forward, but should be a consideration for the lower court in determining whether effective relief is feasible or futile. Second, the Court should give guidance whether the lower courts should actively craft relief or passively rule on relief specifically requested by the parties. The circuit courts which have referred to crafting relief or remanding to the lower courts to determine whether effective relief is possible, have implied that the court should be active, looking beyond the solutions suggested by the parties, to consider the full spectrum of possible relief. The other circuit courts, including the Fifth Circuit, seem to hold that the court should limit itself to responding to the relief requested by the parties.

CONCLUSION

The Court should grant the petition in this case. The Court should hold that equitable mootness is not a bar to all appeals touching a confirmed plan of reorganization. The Court should establish that equitable mootness is not a threshold issue, which deprives litigants of their appeal on the merits before the merits are even considered, but is a factor in determining what remedy should be granted after consideration of the merits of an appeal. The Court should establish guidelines that the lower courts, by remand to the district court or the bankruptcy court if necessary, are to pursue and consider what kind of effective relief can be crafted. The Court should direct that this inquiry should be made on a case-by-case basis to determine the feasibility of

any and all conceivable relief before equitable mootness is applied to terminate an appeal.

Respectfully submitted,

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(any footnotes trail end of each document)
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-10509

In the Matter of: Berryman Products, Inc.,
Debtor

Nationwide Mutual Insurance Company,
Appellant

v

Berryman Products, Inc.,
Appellee

Appeal from the United States District Court for the Northern District of Texas (95-CV-379)

Before Duhe, Barksdale, and Emilio M. Garza, Circuit Judges, PER CURIAM:*

Dismissed as moot. See nationwide Mutual ins. Co. v. Berryman Products, Inc. (in re Berryman Products, Inc.,), 159 F.3d 941 (5th Cir. 1998)

Footnotes

*Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited cirucmstances set forth in 5th Cir. R. 47.5.4.

the United States District Court for the Northern District of Texas (95-CV-379)

Nationwide Mutual Insurance Company,
Appellant

v

Berryman Products, Inc.,
Appellee

ORDER GRANTING DEBTOR—APPELLEE' MOTION TO DISMISS

Pending before the Court is debtor, Berryman Products, Inc.'s ("Barryman") Motion to Dismiss Appeal, filed June 7, 1995. Having carefully considered the motion response, and reply, the Court finds that the motion should be GRANTED.

Nationwide Mutual Insurance Company ("Nationwide') appeals the Bankruptcy Court's April 21, 1995 denial of its Motions for Amendment of Judgment. In the later filed motion for amendment of judgment, Nationwide sought to have the Amended Order Establishing its claim amended to state that the Bankruptcy Court's estimation of the claim was for "allowance" rather than far "voting and feasibility" only, as it was finally worded.

The parties argue extensively about the estimation. However, whether the estimation was a final order subject to appeal, what type of estimation the Bankruptcy court did or should have performed and the effect of that estimation are largely irrelevant here. Estimation, whether for voting,

feasibility, or allowance is a procedure designed to facilitate the confirmation and administration of plan of reorganization See Fed. R. P. 3018; 11 U.S.C. 1129(A) (11); 11 U.S.C. Sec. 502(c). Through estimating an unliquidated or contingent claim, the bankrutpcy Court allows confirmation. Id.; Beaumont v. Durkay 967 F.2d 1047, 1053 (5th Cir.1992); In re Sierra Research Intern., 10 F.3d 944, 957 (1993). Here, the order arpealed the denial of a motion to amend the order establishing the estimated amount of the claim. That order establishing Northwest's claim became part of the plan, which has been confirmed and appealed. Therefore, this appeal is MOOT. Any dispute ever the estimation procedure post confirmation may be addressed through a Rule 503(j) motion to reconsider or appeal of the plan confirmation See Id.

SO ORDERED.

Signed March 20, 1998

In The Matter Of: BERRYMAN PRODUCTS, INC., Debtor; NATIONWIDE MUTUAL INSURANCE COMPANY; MATT VAN HART, Appellants, versus BERRYMAN PRODUCTS, INC.; BERRYMAN PRODUCTS OF DELAWARE, INC., Appellees.

No. 98-10046 Summary Calendar

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

159 F.3d 941; 1998 U.S. App. LEXIS 34945; Bankr. L. Rep. (CCH) P77,898; 33 Bankr. Ct. Dec. 1073; 13 Tex. Bankr. Ct. Rep. 10

November 18, 1998, Filed; December 24, 1998, Issued

COUNSEL:

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For BERRYMAN PRODUCTS OF DELAWARE, INC, Appellees: Jeff Philipp Prostok, Kevin C Norton, Cantey & Hanger, Fort Worth, TX. Craig Howard Averch, Neligan & Averch, Dallas, TX.

JUDGES:

Before WIENER, BARKSDALE, and EMILIO M. GARZA, Circuit Judges.

OPINIONBY:
WIENER

OPINION:

WIENER, Circuit Judge:

This appeal arises from the Chapter 11 bankruptcy proceeding of Berryman Products, Inc. and Berryman products of Delaware, Inc. ("Berryman" or "the Debtor"). n1 Appellants Nationwide Mutual Insurance Company and Matt Van Hart (collectively "Nationwide") appeal the district court's grant of the Debtor's motion to dismiss Nationwide's appeal of plan confirmation on the ground of mootness. Based on the facts before us, we conclude that the merits of the appeal are moot and therefore, dismiss the appeal.

I.

FACTS AND PROCEEDINGS

In March of 1993, the Debtor voluntarily filed for relief under Chapter 11 of the Bankruptcy Code (the "Code") as a result of being cast in judgment for $ 7.5 million in a products liability suit. That case arose from an accident that occurred in California on which Matt Van Hart ("Hart") sued Berryman and others alleging that he sustained injuries in a car that had been serviced with brake cleaner manufactured by Berryman (the "Hart Lawsuit"). Among others, Hart also sued the distributor of the brake cleaner, C.P. Hunt Company ("Hunt"). After a jury trial, the California court found Berryman and Hunt jointly and severally liable for $ 7.5 million, being 80% of the damages sustained by Hart.

At the time of the accident, Berryman was insured by Corporate Underwriters, Ltd., which failed to indemnify

Berryman for losses it suffered by virtue of the Hart judgment. The specter of this judgment motivated Berryman to file voluntarily for reorganization under Chapter 11 of the Code. Hunt, the party jointly and severally liable with Berryman for the Hart judgment, was insured by Nationwide, which then settled with Hart. Nationwide agreed to pay Hart $ 6 million in exchange for a release from liability and the authority to pursue claims in Hart's name.

One month after Nationwide settled with Hart, Berryman filed suit against its own risk manager and Nationwide (the "Berryman Lawsuit"), alleging negligence, breach of express and implied contracts and warranties, breach of fiduciary duties, and negligent misrepresentation in connection with their conduct during the Hart Lawsuit. Additionally, Berryman appealed the verdict in the Hart Lawsuit, which was eventually reversed for trial errors and remanded in early 1995 for a new trial. n2 Both the Hart and Berryman Lawsuits are still pending.

At the onset of the Berryman bankruptcy proceeding, Nationwide, on behalf of Hunt, filed a proof of claim for $ 6 million, the amount paid on the personal injury/products liability claim. On the recommendation of Berryman, the court estimated Nationwide's claim to be $ 6 million for purposes of voting and evaluating the feasibility of a plan; resolution, of the Hart and Berryman Lawsuits was not predicted to occur until three to five years after plan confirmation. Hart too filed a claim for the remaining $ 1.5 million of the net $ 7.5 million personal injury judgment. n3

The Debtor's Reorganization Plan (the "Plan") was structured to assure repayment of 100% of the present value of the claims through issuance of interest-bearing, fifteen year notes for the $ 6 million and $ 1.5 million, respectively.

As state court litigation was ongoing, the term of the notes was set to commence on entry of final orders resolving all contested matters in the Hart and Berryman Lawsuits. In other words, in an effort to avoid undue delay in the administration of the Plan, Nationwide's claims were characterized as contingent and unliquidated. n4 Nationwide objected, to the Plan on various grounds and was the only class of creditors to vote against it. The bankruptcy court held a two-day hearing to evaluate the Plan and contemplate Nationwide's objections, ultitmately, confirming the Plan in July, 1994.

The next month, Nationwide sought a stay [**6] from the bankruptcy court to prevent the Plan's execution and appealed the bankruptcy court's order of confirmation to the district court. The bankruptcy court denied the stay on the merits, and Nationwide appealed its request for a stay to the district court. Citing the failure to follow Bankruptcy Rule 8005, n5 the district court likewise denied the stay. Nationwide neither filed an amended request to correct the deficiencies noted by the district court nor appealed the denial of the stay to this court. In the absence of a stay to prevent execution of the Plan, the Debtor commenced implementation by paying its creditors (with the exception of the Nationwide claims, which were contingent).

As noted, Nationwide had also appealed the bankruptcy court's order confirming the Plan to the district court. Arguing that this appeal was moot, the Debtor filed a motion to dismiss, which was followed by an exchange of response and reply memos. More than a year after the appeal of plan confirmation was filed -- in January, 1996 -- Nationwide requested a hearing on the matter, which the district court

denied. Although it eventually set a hearing in December, 1997, the district court ultimately canceled the hearing and granted the Debtor's motion, finding the appeal moot and inequitable. The district court focused on (1) Nationwide's failure to obtain or diligently seek a stay of the Plan, (2) the Plan's resulting implementation, and (3) the inevitable prejudice that the Debtor would incur from a reversal. Nationwide timely filed this appeal.

II.

ANALYSIS

A. Standard of Review

In the bankruptcy appellate process, we perform the same function, as did the district court: Fact findings of the bankruptcy court are reviewed under a clearly erroneous standard and issues of law are reviewed de novo. n6

B. Applicable Law

Nationwide contests the district court's dismissal of its appeal challenging confirmation of the Plan. Nationwide urges us to reverse the order of dismissal and reach the merits of the appeal, contending that the mootness analysis applied by the district court was flawed. Nationwide focuses on the district court's finding that reversal of the Plan would disrupt trade relationships and jeopardize the Plan's economic core. Instead, Nationwide asserts, the Debtor, in its exclusive discretion, could choose to forego repayment from its creditors, thereby maintaining the status of the Plan and precluding a finding of mootness.

The standard for mootness in the bankruptcy context differs from a constitutional mootness analysis. Article III of

the United States Constitution requires an inquiry into whether a live case or controversy exists; in contrast, reviewing courts considering bankruptcy appeals such as the one now before us seek to determine whether implementation of the reorganization plan has progressed to a point at which fundamental changes in the plan would jeopardize its success. n7 Stated differently, we may decline to consider the merits of confirmation when a plan has been so substantially consummated, that effective judicial relief is no longer available -- even though the parties may have a viable dispute on appeal. n8 Historically, when evaluating dismissal of challenges to reorganization plans in a bankruptcy case as moot, we have looked to see whether (1) a stay has been obtained, (2) the plan has been substantially consummated, and (3) the relief requested would affect either the rights of parties not before the court or the success of the plan. n9 Nationwide argues that in this case each of the elements is lacking in some respect; accordingly, we now evaluate each in turn.

1. Failure to obtain a stay

The first question in a mootness inquiry is whether the appellants secured a stay to prevent execution of the Plan. As correctly noted by the Debtor, the requirement of a stay encapsulates the fundamental bankruptcy policy of reliance on the finality of confirmation orders by the bankruptcy court. n10 Nationwide asserts that because it diligently pursued a stay, its failure to obtain the stay does not require dismissal of the proceeding as moot. n11 We rejected this argument in In re Manges. n12 In response to a similar argument, we cited with approval a Seventh Circuit opinion that stated, "[a] stay not sought, and a stay sought and denied, lead equally to the implementation of the [*945] plan of

reorganization." n13 In Manges we recognized that a reviewing court's decision not to grant a stay is often dispositive of a mootness challenge on appeal, but that provisions of the Bankruptcy Code "preordain" such a consequence. n14

In this case, Nationwide unsuccessfully petitioned both the bankruptcy and district courts to obtain a stay, yet failed to appeal the stay to this court or to amend its motion in the district court to comply with procedural inadequacies. In the absence of a stay, the Plan became effective and was implemented over the course of four years. Consistent with our Manges opinion, we conclude that even though Nationwide sought a stay -- pursued with a marked lack of diligence, we might add -- the stay was denied and the Plan was largely implemented. Consideration of this factor thus militates in favor of dismissal for mootness.

2. Substantial consummation of the Plan

The second question in the mootness inquiry is whether the Plan has been substantially consummated, which the Code defines as: (a) transfer of substantially all property the plan proposes to transfer; (b) the debtor's assumption of the business or management of substantially all property dealt with by the plan; and (c) commencement of distribution under the plan. n15 At this time -- more than four years after the effective date of the Plan -- the Debtor has repaid $ 1.37 million in trade debt and has retired $ 2.15 million in secured debt owed to an insider of the company; the allowed claims has been effectively repaid in full. n16

Nationwide argues that because distributions have never commenced on its $ 6 million claim, the plan cannot have

been substantially consummated. Nationwide attempts to characterize its claim as non-contingent and liquidated because the bankruptcy court, in an estimation proceeding, recognized the indemnity obligation owed to Nationwide by the Debtor. Nationwide supports its argument by attempting to distinguish its right to indemnity from the personal injury judgment in the Hart Lawsuit, insisting that its indemnity claim is not contingent on the outcome of the Hart Lawsuit appeal. We disagree. The judgment in the Hart Lawsuit was partially satisfied by Nationwide, which sought indemnity for its payment. This payment, however, is the basis of the Debtor's claim against Nationwide on grounds of breach of warranty and fiduciary duties (the Berryman Lawsuit). Consequently, the indemnity obligation owed by the Debtor to Nationwide is directly contingent on the outcome of both the Hart and Berryman Lawsuits.

Furthermore, the bankruptcy court estimated the value of Nationwide's claim at $ 6 million solely for voting and feasibility purpose -- not for allowance. Nationwide's claim will not become an "allowed" claim until the conclusion of all the state court litigation. At the present time, the Debtor has fulfilled all obligations allowed under the Plan, thereby resulting in its substantial consummation. n17 We find Nationwide's arguments unavailing and conclude that the second factor in this analysis weighs in favor of dismissal as moot.

3. Effect on parties not before the court

The final question in the mootness inquiry is whether the requested relief would affect the rights of parties not before the court or the success of the Plan. Nationwide assures us that it does not seek piecemeal revision or amendment of the

Plan, but requests reversal of Plan confirmation in its entirety. In seeking reversal of confirmation, Nationwide contends that the Debtor need not restore distributions made under the Plan, citing section 549 of the Code to support this proposition. Nationwide's argument, however, has no applicability in this context. Section 549 provides, in pertinent part: "The trustee may avoid a transfer of property of the estate . . . that is not authorized by this title or by the court." n18 Under this section, a two year statute of limitations is placed on recovery of such post-petition transfers unauthorized by the Code. n19 In contrast to the situation addressed in section 549, the Plan expressly authorized the payments made by the Debtor in accordance with the Bankruptcy Code. Section 549 does not address Nationwide's argument, and Nationwide does not cite any authority for the proposition that, in reversing the Plan, the Debtor can forgo repayment from creditors. To the contrary, we remain satisfied that reversal of the Plan means exactly that -- placing the parties in the status quo pre-confirmation. n20

Unraveling the Plan at this time clearly would affect the position of trade creditors who granted concessions to the Debtor under the reorganization. In fact, trade creditors reinstated favorable pre-bankruptcy terms to the Debtor in exchange for full satisfaction of their claims. The restored terms fueled the success of the reorganization and allowed the Debtor to pass savings on to its customers. Reversal of these payments would frustrate creditor relations and the emergence of the Debtor as a viable going concern in the economy. n21 We are satisfied that, like the first two factors, this third one weighs against, interfering with the Plan after the passage of some four years.

III.

CONCLUSION

The district court properly granted the Debtor's motion to dismiss because Nationwide's appeal met the test for mootness. Nationwide did not secure or diligently pursue a stay to prevent execution of the Plan, as a result of which the Plan was substantially consummated. The Debtor has extinguished 100% of the obligations provided for in the Plan, with the exception of the Nationwide claims, which presumably will be allowed when all state court litigation is finally resolved. Returning the Debtor to the pre-confirmation status quo now would undermine the success of the Plan and jeopardize critical trade relations of the Debtor. For the forgoing reasons, we decline to reach the merits of the Plan, and we dismiss the appeal of confirmation order as moot.

APPEAL DISMISSED.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the appeal in this cause is dismissed as moot.

IT IS FURTHER ORDERED that appellants pay to appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: DEC 24 1998

----------Footnotes----------

n1 The briefs filed in this appeal reference a single Debtor, "Berryman Products, Inc.," but the appellees are listed as "Berryman Products, Inc. and Berryman Products of Delaware, Inc." We refer to a single Debtor throughout the opinion, but to the extent that both Berryman Products, Inc. and Berryman Products of Delaware, Inc. are affected, the term Debtor in the singular references both entities.

n2 Unlike Berryman, Nationwide did not appeal the verdict in the Hart Lawsuit.

n3 During the pendency of the bankruptcy proceeding and the Hart Lawsuit appeal, Matt Van Hart died and all claims in his name have subsequently inured to his estate.

n4 See *11 U.S.C. § 502*(c) (1994); BANKR. R. 3018(a) (providing for the estimation of claims for purposes of voting to accept or reject a plan).

n5 Bankruptcy Rule 8005 provides that a motion for stay pending appeal made to the district court must show why the relief was not obtained from the bankruptcy judge. BANKR. R. 8005. The district court found that "appellant in no way indicates the reasons for the bankruptcy judge's denial of its request for a stay." The district Court further noted that notwithstanding the procedural deficiency, appellants failed to make the necessary showing that they were entitled to a stay pending appeal.

n6 *Matter of Crowell, 138 F.3d 1031, 1033 (5th Cir. 1998); Matter of U.S. Abatement Corp., 79 F.3d 393, 397 (5th Cir. 1996); In re Block Shim Dev. Co.-Irving, 939 F.2d 289, 291 (5th Cir. 1991).* Nationwide urges this court to adopt a plenary standard of review because the district court on appeal did not have access to the entire bankruptcy court

record. In our review, we are not limited to the record examined by the district court, but refused to adopt a plenary standard of review as it applies to issues of fact. As we have repeatedly held, findings of fact are reviewed under the clearly erroneous standard. See *Block Shim, 939 F.2d at 291* (in evaluating dismissal of a case as moot, the court "reviews factual findings of the district court using a clearly erroneous standard in light of the entire record.").

n7 *In re Manges, 29 F.3d 1034, 1038-39 (5th Cir. 1994),* cert. denied, *513 U.S. 1152, 130 L. Ed. 2d 1071, 115 S. Ct. 1105 (1995).*

n8 *Id. at 1039;* see also *In re Andreuccetti, 975 F.2d 413, 418 (7th Cir. 1992); In re Crystal Oil Co., 854 F.2d 79, 82 (5th Cir. 1988); In re Roberts Farms, Inc., 652 F.2d 793, 798 (9th Cir. 1981).*

n9 *Manges, 29 F.3d at 1039; Block Shim, 939 F.2d at 291.*

n10 *In re Public Serv. Co., 963 F.2d 469, 471-72* (1st Cir.) ("the equitable component [to the mootness doctrine] centers on the important public policy favoring orderly reorganization and settlement of debtor estates"), cert. denied, *506 U.S. 908 (1992); In re Information Dialogues, Inc., 662 F.2d 475, 476-77* Cir. 1981) ("The mootness doctrine promotes an important policy of bankruptcy law -- that court-appointed reorganizations be able to go forward in reliance on such approval unless a stay has been obtained.").

n11 Nationwide cites *In re Federated Dept. Stores, Inc., 44 F.3d 1310 (6th Cir. 1995)* and *Matter of 203 LaSalle St. Partnership, 126 F.3d 955 (7th Cir. 1997),* cert. granted, *118 S. Ct. 174 (1998),* to support its proposition. In our view, however, neither of these cases provide guidance. Federated involved the appointment of a financial advisor, which the

Court termed a "collateral consequence" to reorganization, *44 F.3d at 1315-16, and 203* LaSalle St. involved the reversal of a bankruptcy plan because innocent third parties were unharmed. *126 F.3d at 961.*

n12 *29 F.3d at 1039-40.*

n13 *Manges, 29 F.3d at 1040,* quoting *In re UNR Indus., Inc., 20 F.3d 766, 769-70* (7th Cir.), cert. denied, *513 U.S. 999, 130 L. Ed. 2d 416, 115 S. Ct. 509) (1994).*

n14 *Manges, 29 F.3d at 1040* (citing to sections of the Bankruptcy Code and Bankruptcy Rules that prohibit reversal or modification of unstayed bankruptcy orders).

n15 *11 U.S.C. § 1101*(2) (1994). n16 The district concluded that substantial consummation had occurred based on 150 distributions to trade creditors totaling $ 337,000. Subsequent to the briefings in the district court, the Debtor made additional payments under the Plan. We evaluate all payments made by the Debtor at the time this appeal, which, includes these additional payments. See *Manges, 29 F.3d at 1041* ("This court may review evidence as to subsequent events before the courts below which bears upon the issue of mootness.")

n17 See *Block Shim, 939 F.2d at 291* (finding substantial consummation under the Code because "Block Shim and its creditors have completed every transfer contemplated by the plan").

n18 *11 U.S.C. § 549*(a) (1994).

n19 Id. (emphasis added). The Debtor in this case would be outside of the two year limit.

n20 See e.g. *Manges, 29 F.3d at 1043* (doubting that the status quo as it existed before the confirmation order could be attained if the court unraveled the Plan); *Miami Ctr. Ltd. Partnership v. Bank of New York, 838 F.2d 1547, 1557 (11th Cir. 1988)* (holding that it would be legally and practically impossible to restore the status quo, before confirmation), cert. denied, *488 U.S. 823, 102 L. Ed. 2d 46, 109 S. Ct. 69 (1989).*

n21 See *Crystal Oil, 854 F.2d at 81* ("loss of this plan would disrupt a very successful organization.").